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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN CUNEO, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. May the National Labor Relations Board declare that a strike, found by it to have been economic in origin, was converted to an unfair labor practice strike *ab initio* where the unfair labor practices relied upon to support the fiction of conversion did not occur until after the strike had already ended.

2. Whether the National Labor Relations Board properly ordered the Company to bargain where the bargaining order is based upon widely scattered and isolated unfair labor practices which were found to have occurred over a six month period of time.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

John Cuneo, Inc. (Company) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 18, 1982, enforcing an order of the National Labor Relations Board (Board) against the Company.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. A-1-A-30) is reported at 681 F.2d 11 (1982). The Decision and Order of the Board (Appendix B, *infra*, pp. A-31-A-76) is reported at 253 NLRB 1025 (1981).

JURISDICTION

The decision of the court below issued on June 18, 1982, and judgment was entered that day. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May the National Labor Relations Board declare that a strike, found by it to have been economic in origin, was converted to an unfair labor practice strike *ab initio* where the unfair labor practices relied upon to support the fiction of conversion did not occur until after the strike had already ended.

2. Whether the National Labor Relations Board properly ordered the Company to bargain where the bargaining order is based upon widely scattered and isolated unfair labor practices which were found to have occurred over a six month period of time.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. §151, *et seq.*), are set forth in Appendix C., *infra* (p. A-76-A-78).

STATEMENT OF THE CASE

In this case the Court of Appeals had before it two petitions for review, No. 81-1705 filed by petitioner Company, No. 81-1025 filed by the Union, as well as a cross-petition by the Board for enforcement of its order against the Company. A panel of the Court of Appeals enforced the Decision and Order of the Board in full and denied the petitions for review. (A-30) The Decision and Order of the Board, enforced by the Court of Appeals, found the Company to have been guilty of violations of Sections 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), (3), and (5). The Board ordered the

Company to cease and desist, to offer reinstatement with back pay to certain employees, and to bargain with the Union, retroactive to the date of commission of the first unfair labor practice after the Union had obtained a majority of the employees' authorizations. (Appendix B pp. A-40-A-44).

A. The Facts.

The Company designs, manufactures, and sells fire protection sprinkler systems at its place of business in Chattanooga, Tennessee (A-3). On September 15, 1977, Road Sprinkler Fitters Local Union No. 669 (Union) conducted an organizational meeting with the Company's employees. During that meeting, and later that day, a majority of the employees then employed signed authorization cards (A-3).

On September 16, 1977, the Union representatives visited the president of the Company and demanded recognition. The request was denied, and the Union was told to seek an election through Board processes (A-3).

B. The Unfair Labor Practices Found.

1. Interrogation and threat of Gerald Hall.

After the demand from the Union, the president called Gerald Hall into his office and questioned him about his union views and the organizational drive. Hall refused to talk (A-4). He was interrogated again later that day (A-4). On September 20, 1977, Hall was again called to the president's office, interrogated, and, according to the Board, threatened with discharge (A-4).

While the Company did not deny interrogating Hall, it asserted that he was a supervisor and, consequently, that no violation occurred. The supervisory status of Gerald Hall was litigated extensively. The basis for the Company's position that

Gerald Hall was a supervisor is contained in the testimony of witnesses called by the Company, the Board, and the Union (see A-78-A-83).

2. **Impression of surveillance.**

Also alleged as unfair labor practices were four incidents of alleged creation of the impression of surveillance. The first occurred on September 16, 1977, when the Company told a supervisor (who later joined the employees on strike) (A-5) to find out who had signed authorization cards (A-4). The violation was found to have occurred when this supervisor told an employee that the president had instructed him to find out who had signed cards (A-11).

On September 21, 1977, a recognitional strike began (A-5). After that, there were three incidents in which Company agents photographed picketers. Two incidents occurred on September 23 and one on October 14, 1977. The Company admitted taking the pictures. It explained its rationale for doing so as being (1) to obtain a picture of the employee and the vehicle involved in an incident of prior serious picket line misconduct for use by the Company to assist a non-striking replacement employee in identifying the perpetrator, and (2) to obtain photographic evidence in support of charges alleging violation of Sections 8(b)(4) and (7) of the Act (both of which may require proof that a union picketed). These photographing incidents were found to create the impression of surveillance based on the theory that such conduct is inherently destructive of employee rights (A-34; A-57-A-58). The ALJ rejected the Company's justification simply by stating "I do not accept Respondent's explanation" (A-57).

3. **Reinstatement.**

The strike lasted from September 21 to November 14, 1977. The above-recited unfair labor practices were the only ones found to have been committed prior to and during the period of the strike (A-6).

The Board, rejecting the findings of its ALJ, found that the strike was an economic strike in origin and was not caused by the unfair labor practices of the Company (A-35-A-36). When the strikers offered to return to work on November 14, as of that date they were economic strikers, entitled to immediate reinstatement to their former positions unless a permanent economic replacement had been hired. Otherwise, they were entitled to reinstatement only if a vacancy occurred (A-14).

The most egregious unfair labor practice found to have occurred was the Company's failure to reinstate the striking employees in a timely fashion (A-20). The case was tried under the theory that the strike was an unfair labor practice strike from its inception (A-65-A-66). When the theory was rejected by the Board, it fell back on the fact that a small number of strikers were not timely reinstated as evidencing the Company's anti-union animus. The fact of the matter is, no one even discovered this "egregious" act until some three years later when the matter was before the Board.

4. **February, 1978 unfair labor practices.**

The final unfair labor practices found to have occurred took place in February, 1978, when the Company adopted an allegedly discriminatory no-talking rule and a tardiness rule and enforced those rules against employees (A-16).

C. **The Board's Decision And Order.**

The Board affirmed the ALJ's findings that Gerald Hall was an employee and that the Company's interrogation and threats violated the Act, that the Company created the impression of surveillance through the statement of Supervisor Collins to an employee and through the three picture taking incidents, and that the February, 1978, promulgation and enforcement of rules was violative of the Act. The Board, however, refused to accept the ALJ's conclusion that the strike was an unfair labor practice

strike from its inception, holding instead that there was no causal relationship between the unfair labor practices committed on September 16 and 20 and the start of the strike (A-35-A-36).

Relying on its decision in *Drug Package Company, Inc.*, 228 NLRB 108 (1977), *enf'd as mod.*, 570 F.2d 1340 (8th Cir. 1978), the Board nevertheless held that the strike was in fact an unfair labor practice strike *ab initio*, because "when employees strike for recognition which should have been granted at the time they went on strike and where the employer engaged in contemporaneous widespread illegal conduct designed to frustrate the statutory scheme, and bargaining in particular, the striking employees were unfair labor practice strikers." By far, the unfair labor practice which was found to be the most egregious was the alleged untimely reinstatement of the strikers at the strike's end (A-36-A-37).

The Board ordered the Company to bargain with the Union, to post appropriate notices, to cease and desist, and to reinstate with back pay, as of November 14, 1977, certain strikers. The Board's bargaining order was made retroactive to September 16, 1977, the date of the first unfair labor practice following attainment of majority support (A-41-A-44).

D. **Court of Appeals.**

The Court of Appeals enforced the Board's order in its entirety, specifically approving the imposition of a retroactive bargaining order, and further endorsing the retroactive conversion of the economic strike into an unfair labor practice strike by subsequent unfair labor practices (A-30; A-22-A-30).

REASONS FOR GRANTING THE WRIT

The Decision Below Is A Significant Departure From Decisions Of This Court Pertaining To Reinstatement Rights Of Strikers, And Alters Well Established Principles Of Federal Labor Law Such That Review Is Appropriate.

By imposing a retroactive bargaining order and holding that the employer had a duty to bargain from the date it committed its first unfair labor practice, and then holding that due to this "fiction," an economic strike was really an unfair labor practice strike makes a shambles of the doctrine of striker reinstatement rights as enunciated by this Court, and subordinates the favored policy of conducting elections to administrative convenience.

In this case, accepting, *arguendo,* the finding below that the first unfair labor practice occurred on the same day the majority union demanded recognition, at that point, although having violated the Act, such violation was not so serious as to warrant a bargaining order under the decision of *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575 (1969). Thus, in rejecting the Union demand for recognition the employer acted entirely within its right as set forth in *Linden Lumber Division* v. *NLRB,* 419 U.S. 301 (1974).

When the strike began on September 21, it began as an economic strike. The Board expressly rejected the ALJ's finding that the strike was begun in response to the employer's unfair labor practices. Nothing occurred during the strike to change it from an economic strike to an unfair labor practice strike. Consequently, for the entire duration of the strike, it must be concluded it remained an economic strike.

According to *Mackay Radio & Telegraph* v. *NLRB,* 304 U.S. 333 (1938), an employer has the right to hire permanent replacements for economic strikers and need not discharge

those replacements to rehire the strikers. Economic strikers are entitled to reinstatement to any vacancies which exist when they unconditionally offer to return to work, or to any vacancies resulting from departure of the replacements or expansion. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enf'd*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). As of November 14, 1977, when the strike ended, the strikers were entitled to the reinstatement rights of economic strikers and nothing more. Replacements would have the right to stay and no back pay would be due strikers rightfully refused reinstatement.

The Court of Appeals recognized this and struggled with the concept of retroactively making the strike an unfair labor practice strike. By far the most serious unfair labor practice found by the Board, failure to timely reinstate economic strikers, and the one violation which undoubtedly tipped the scales for the *Gissel* order, occurred after the strike ended. It cannot be possible, therefore, for a strike which was previously found to be economic, to be an unfair labor practice strike when the single unfair labor practice found by the Board to warrant the bargaining order had not occurred. The Board and Court of Appeals correctly concluded that in order for a strike to be an unfair labor practice strike, there must be a causal connection between the unfair labor practices and the strike, such that the strike is the direct outcome of the unfair labor practices. *NLRB* v. *Pope Maintenance Corp.*, 573 F.2d 898 (5th Cir. 1978); *NLRB* v. *Colonial Haven Nursing Home, Inc.*, 542 F.2d 691 (7th Cir. 1976); *Typoservice Corp.*, 203 NLRB 1180 (1973).

Here there was no causal connection between the strike and the unfair labor practices, because the strike was over at the point the Employer committed the unfair labor practice which supposedly justified the bargaining order. It was what occurred *after* the strike ended, not what preceded or occurred during it, that caused the Board to conclude that the Employer should

have bargained upon demand. Up until the strike ended, though, the Employer acted lawfully in refusing recognition. In its zeal to undo the effects of the Union's tactical blunder, however, the Board, in holding that the strikers were unfair labor practice strikers, has favored the economic strikers over the replacements and ordered the replacements to be fired to make way for the strikers, thereby granting the strikers greater rights than those to which they are entitled under *Mackay Radio & Telegraph, supra.*

It would appear that the Board is adopting the retroactive bargaining order concept for sheer administrative convenience. In other situations, it is feasible to define a point at which the employer's conduct converts an economic strike into an unfair labor practice strike. See, *NLRB* v. *Pecheur Lozenge Co.*, 209 F.2d 393 (2d Cir. 1953), *cert. denied*, 347 U.S. 953 (1954); *National Car Rental System, Inc.* v. *NLRB*, 594 U.S. 1203 (8th Cir. 1979). Holding that a strike which starts and ends as an economic strike is really an unfair labor practice strike is, contrary to the Court of Appeals conclusion, a punitive measure, *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7 (1940). In situations where no strike occurs, making a bargaining order retroactive, probably has little or no practical effect. However, where a strike occurs, the bargaining order retroactively affects not only the employer, who might be liable for back pay even though when he refuses to reinstate the strikers he has not transgressed the limit prohibited by *Gissel*, such as occurred here, but also the lawful right of the strike replacements to keep their jobs, as distasteful as that may be to the Union.

The Board's retroactively making the strike an unfair labor practice strike has the additional effect of disenfranchising the strike replacements. It is well established that economic strike replacements are eligible to vote in representation elections. *W. Wilton Wood, Inc.*, 127 NLRB 1675, 1680 (1960). Consequently, the unit of eligible voters was greatly expanded on the date the

strike ended. The Union could very well have lost its majority status before the employer committed the unfair labor practice which would have otherwise justified a *Gissel* bargaining order. See *Struthers-Dunn, Inc.* v. *NLRB,* 574 F.2d 796 (3d Cir. 1978). For this reason alone, once the retroactive bargaining order is overturned, the case should be remanded to the Board for consideration of this issue.

The Court should also consider whether the record as a whole contains substantial evidence to support the Board's bargaining order. *Gissel* makes clear that elections are by far the most favored method of selecting representatives. Here, as set forth in the facts, the employer was found to have committed several unfair labor practices, the most serious being the failure to reinstate strikers after the strike's end. The crucial piece of evidence on this matter was Respondent's Exhibit 11, which the ALJ did not rely upon and which the Board seized upon as being incomplete. The case was tried as an unfair labor practice strike caused by the unfair labor practices prior to September 21, 1977 (A-65-A-66). Respondent's Exhibit 11 was a summary of voluminous documentary evidence produced pursuant to subpoena. It was the subject of a three-hour off the record meeting. Everyone at the trial was satisfied. This was really not at issue at trial since the theory pursued was that the strikers were entitled to immediate reinstatement upon application. When this theory fell at the Board level, the untimely reinstatement issue was picked up by the Board to achieve the same result as the ALJ. Fundamental fairness requires a remand to reopen the hearing and allow further evidence on the crucial Exhibit 11. This was requested in the proceedings below and summarily denied (A-84-A-85).

CONCLUSION

The Board and the court below have adopted a hocus pocus strategy to circumvent well established principles of labor law and to afford replaced economic strikers with greater rights than what has heretofore been permitted by this Court. It is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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